Supreme Court of the United States

OCTOBER TERM, 1948

No. 255

GERHART EISLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION OF AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*

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May it Please the Court:

The undersigned, as counsel for American Committee for Protection of Foreign Born, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

LEE EPSTEIN,
Counsel for American Committee
for Protection of Foreign Born,
as *Amicus Curiae*.

SUPREME COURT OF THE UNITED STATES

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BRIEF OF AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN, AS *AMICUS CURIAE*

I

Preliminary Statement

This brief is filed on behalf of the American Committee for Protection of Foreign Born, with the written consent of both parties to the pending case. The members of this Committee and associates—organizations of the foreign born, trade unions, church, social welfare, civil liberty and civic organizations throughout the country—recognize the necessity, never greater than at present, of insuring to the foreign born in our midst (citizen and non-citizen) the full protection to which they are entitled under our laws. This necessity is made more urgent, in the instant case, by the fact that the country from which the defendant-petitioner

comes, and which, under normal conditions might properly intervene through diplomatic channels to protect his rights, is a conquered country still under military occupation. Even the protecting power (Switzerland) which might have intervened in his behalf during the war, has ceased activities since the suspension of hostilities.

The American Committee for Protection of Foreign Born has a particular interest in the instant case because it has been at the forefront of the campaign to secure for the defendant-petitioner the right to leave this country in order to return to Germany.

II

The Facts

The defendant was subpoenaed to appear before the House Un-American Activities Committee While preparing to appear, he was placed under arrest as an alien enemy (stipulated at p. 89 record, fol. 218) the day before he was to testify. He was taken to the committee hearing under guard and in arrest (see opinion below, *Eisler* v. *U. S.*, 170 Fed. (2d) 273, 276 (1948)).

It is the defendant's contention that, by arresting him as an alien enemy, the Attorney General (regardless of the motive inspiring the arrest) conferred on the defendant immunity from testifying, in accordance with Article V of the Geneva Convention relating to Prisoners of War. This contention was made by a preliminary motion to dismiss the indictment (Record, pp. 218-220, fol. 463) by motion at the trial (Record, p. 153, fol. 351), and by motion in arrest of judgment (Record, p. 228, fol. 473). The point was also raised on the appeal to the Court of Appeals (see *Eisler* v. *United States*, 107 Fed. (2d) 273, 281 (1948)).

This brief *amicus curiae* is devoted solely to the point that the charge against the defendant must fall because of

the immunity against involuntary testimony granted to arrested alien enemies by the Geneva Convention re Prisoners of War.

III

Argument

SUMMARY OF ARGUMENT

Point A. As an arrested alien enemy, the defendant was entitled to the same rights as a Prisoner of War.

Point B. The defendant, as a Prisoner of War, cannot be punished for refusal to testify.

Point C. The immunity granted by the Geneva Convention has not been revoked.

POINT A

As an arrested alien enemy, the defendant was entitled to the same rights as a Prisoner of War.

An alien enemy who is arrested is entitled to at least the same protection as a prisoner of war. Basic Field Manual FM 27-10, "Rules of Land Warfare", issued over the signature of General Marshall, Chief of Staff, by order of the Secretary of War, states (p. 16):

"Chapter 4. Prisoners of War.

70. Definition—Except as otherwise hereinafter indicated, every person captured or interned by a belligerent power because of the war is, during the period of such captivity or internment, a prisoner of war, and is entitled to be recognized and treated as such under the laws of war."

The same point is made in the text book "Law of Land Warfare", prepared at the Judge Advocate General's School conducted by the Army at Ann Arbor, Michigan (p. 47):

> "*Civilian internees.* Civilian aliens found in a belligerent's own territory at the outbreak of war may be interned. Such persons are, under the American and English practices as well as by the weight of authority under international law, treated as prisoners of war. The United States and the enemy governments, namely, Germany, Italy and Japan have agreed through the Swiss Government to treat interned civilian alien enemies, on a reciprocal basis, at least as favorably as prisoners of war."

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The undertaking of our government is expressed as follows: "This Government declared that enemy aliens whom it might be found necessary to intern would be treated at least as favorably as prisoners of war." United States Department of State Bulletin, vol. VI, No. 152, pages 445, 446, May 23, 1942.

This was the rule before it was restated in the Department of State Bulletin. Hyde, formerly Solicitor for the Department of State of the United States, in his monumental work "International Law, Chiefly as Interpreted and Applied by the United States", says at page 1862 of volume 3:

> "If recourse is had to internment, the individuals taken into custody, until convicted of offenses against the local law, are believed to be entitled to treatment as favorable as that accorded prisoners of war."

The leading British work states:

> "Every individual who is deprived of his liberty, not for a crime, but for military reasons, has a claim

to be treated as a prisoner of war . . . The (Geneva) Convention does not contain anything regarding the treatment of *private* enemy individuals, and enemy officials, whom a belligerent thinks is necessary to make prisoners of war; but it is evident that they may claim all the privileges of such prisoners. They are not convicts, but are taken into captivity for military reasons, and are therefore prisoners of war."

"And the same is valid with regard to enemy civilians who at the outbreak of war are on the territory of a belligerent, and, for military reasons, are interned. They are not convicts either, but are deprived of their liberty for military reasons only, and are therefore prisoners of war." 2 Oppenheim, International Law (6th Edition, Lauterpacht) § 127, pp. 299-300.

The Judge Advocate General of the United States Army instructed all parties concerned that interned alien enemies were to be treated as prisoners of war. Opinion SPJGW 1942—4753, October 12, 1942 reported in 1 Bulletin of the Judge Advocate General, page 259, which states:

"This office has been informed orally by the Department of State that an agreement has been made through the Swiss government with the enemy governments that civilian enemies detained are to be treated as prisoners of war."

See also opinion of the Judge Advocate General to the Provost Marshal General, SPJGW 1943—3029, February 26th, 1943 reported at 2 Bulletin of the Judge Advocate General, page 51, which says in part:

"Accordingly, to determine the position of a German civilian internee we look, in principle, to the rights and liabilities of a German prisoner of war charged with the same unlawful act."

This rule is followed by the British opposite number of our Manual for Court-Martial, the Manual of Military Law, which states (appendix 12, p. 15):

> "The following can claim to be treated as prisoners of war:
>
> . . . . . .
>
> (c) Private enemy individuals and enemy officials whom a belligerent thinks it necessary to make prisoners. Although the Hague Rules and Prisoner of War Convention do not contain anything regarding the treatment of these individuals, they are not civil prisoners because they are taken into captivity for military reasons and are therefore Prisoners of War."

See also Flory, "Prisoners of War", 24-27, and Robert R. Wilson, "Treatment of Civilian Alien Enemies", 37 American Journal of International Law 30 (1943).

United States War Department Mobilization Regulations, No. 1-11 (1 April 1940) states, at page 3:

> "Every person captured or interned by a belligerent power because of war is, during the captivity or internment, a prisoner of war, and is entitled to be recognized as such under the laws of war."

This is the position taken by the unanimous court in *Rex* v. *Commandant of Knockalow Camp (Ex parte Forman)*, 117 Law Times Reports 627 (1917), and in *King* v. *Supt. of Vine St. Police Station*, 1 KB 268 (1916), where Judge Bailhache said at page 275:

> "I have come to the conclusion that a German subject resident in the United Kingdom, who in the opinion of the Executive Government is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although not a combatant or spy."

The language may be aptly paraphrased to meet this case: the defendant, who was, at the time of the alleged offense, in the opinion of the Attorney General an alien enemy dangerous to the public peace and safety of the United States, and on that account interned, was properly described as a prisoner of war.

POINT B

The defendant, as a Prisoner of War, cannot be punished for refusal to testify.

The Attorney General has conferred upon the defendant the status of prisoner of war, and thereby made him immune from punishment for refusal to testify before the Committee.

The Geneva Convention on Prisoners of War (ratified by the United States in 47 Stat. 2021, January 16, 1932) states, at Article 5:

> "Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number * * * Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever."

Law of Land Warfare (op. cit.) states, at page 58:

> "A prisoner of war is bound to give, if questioned, his true name and rank *or* his serial number. The only punishment for refusal to supply such information or giving false information that may be imposed is the loss of privileges accorded to prisoners of his class. A prisoner may not be deprived of other privileges because he refuses to give *other* information. He may be questioned on any subject but he need not answer nor may he be coerced into giving such information." (Emphasis in original.)

This is in accord with Spaight, "Air-Power and War Rights", 340:

> "Loss of privileges is the only punishment which a refusal to state name or number entails upon a prisoner, and he may not be deprived of any privileges because he refuses to give other information. He may, however, be questioned on any and every subject, but he is not bound to reply."

Oppenheim (op. cit.) says (§ 126a, p. 294 of vol. 2):

> "The (Geneva) Convention contains detailed provisions concerning the information which the captor is entitled to ask from the prisoners. Such information is confined to a declaration of the prisoner's true names and rank, or his regimental number."

The immunity from giving testimony is, as stated above, expressly granted by Article 5 of the Geneva Convention on Prisoners of War—a treaty duly ratified by the United States, and as such, the supreme law of the land. As stated in Article VI of the Constitution, "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land".[1]

POINT C

The immunity granted by the Geneva Convention has not been revoked.

The statute under which the defendant is charged cannot revoke the immunity of the treaty. At the outset, it is clear that statutes should not be interpreted as in conflict with treaties unless there is no other reasonable

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[1] Accord: *Maiorano* v. *Baltimore and Ohio RR Co.*, 213 U. S. 268, 272-273 (1909), 5 Hackworth, Digest of International Law (1942) 174-177.

interpretation but that the two are incompatible.[2] If this rule is applied, alien enemies and prisoners of war must be held to be an implied exception from the scope of the statute.

But if it is felt that there is a clear conflict between the statute and the treaty, the treaty must prevail, as later in time. "Where a treaty and an act of Congress are wholly inconsistent with each other and the two cannot be reconciled, the courts have held that the one later in point of time must prevail".[3] "The latest expression controls, whether it be treaty or an act of Congress".[4]

The statute under which this charge is laid was enacted on 24 January 1857 (c. 19, § 1, 11 Stat. 155). The treaty was ratified some 75 years later, on 16 January 1932 (47 Stat. 2021). The treaty therefore controls.

It may be contended that the amendment to the statute (adding a reference to joint committees) in 1938 (52 Stat. 942), was a re-enactment of the statute which therefore repealed the treaty. This is not its effect. In a similar case, a statute pre-dated a treaty, and was re-enacted, in identical words, after the treaty was ratified. It was urged that, because of the re-enactment, the statute was later in time and should prevail. The Supreme Court rejected this view, and said, per Brandeis, J.:

> "The Treaty was not abrogated by re-enacting § 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed * * * Here, the contrary ap-

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[2] *Johnson* v. *Browne*, 205 U. S. 309, 321 (1907).

[3] 5 Hackworth, Digest of International Law (1942) 186.

[4] *United States* v. *Thompson*, 258 Fed. 257, 268 (1919).

pears. The committee reports, and the debates upon the Act of 1930, like the re-enacted section itself, make no reference to the treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its re-enactment."[5]

But even more conclusive than the above authority, which is itself sufficiently determinative, are the rulings of the Supreme Court that the statute must be construed so as not to punish more than the Congressional committee can lawfully require. Thus it does not punish refusal to give testimony on a subject-matter not within the inquiry powers of Congress, although it contains no express reservation to that effect.[6] Certainly the committee of a single House of Congress cannot assume authority in derogation of a solemnly ratified treaty or even (without the most express language to that effect) in contradiction of accepted principles of international law.

The protection of the Geneva Convention re Prisoners of War extends to the defendant. While under arrest as an alien enemy, he was not under a duty to testify before the House Un-American Activities Committee, and therefore did not violate the statute under which he has been indicted.

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[5] *Cook* v. *United States*, 288 U. S. 102, 119-120 (1933).

[6] *In re Chapman*, 166 U. S. 661 (1897); *cf. Sinclair* v. *United States*, 279 U. S. 263 (1929); *Townsend* v. *United States*, 68 App. D. C. 223, 95 Fed. (2d) 352, cert. denied 303 U. S. 664; *Henry* v. *Henkel*, 207 Fed. 895 (S. D. N. Y. 1913); and see *Jurney* v. *MacCracken*, 294 U. S. 125, 151 (1935), citing *In re Chapman* with approval.

CONCLUSION

The conviction of the defendant-petitioner should be reversed and the charge against him dismissed.

Respectfully submitted,

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for Protection of Foreign Born,
as *Amicus Curiae*.